

# Gazette Supplement



## Question under Part 5 of Congregation Regulations 2 of 2002

Congregation

14 June

### Question

The University must secure lawful freedom of speech in order to comply with the law and in order to maintain its reputation as a free-thinking institution. It also has, simultaneously, legal and indeed moral obligations to prevent the harassment of all staff and students.

We believe the University's Harassment Policy and its policy on 'Using social media: Guidance for managers and employees on social media use' (the "policies") prohibit speech that is lawful and thereby breach the University's legal duty to take such steps as are reasonably practicable to secure freedom of speech within the law.

This is not a matter of mere legal technicality. These policies frustrate academic freedom - the lifeblood of this University - and harm academic careers. The signatories do not seek to undermine the University's culture of robust tolerance and decency. They do believe, however, that restrictions on academic freedom and freedom of speech must be lawful, and therefore ask if Council will amend, or procure the amendment of the policies so that they comply with the University's legal obligations to secure academic freedom and freedom of speech, by taking the following steps:

(a) Amending Statute XI.1(1)(e), the Harassment Policy and any other University policy that adopts a legally incorrect definition of harassment, so as to make them compliant with the law and the Code of Practice on Meetings and Events, in particular by taking account of the fact that the University may not rely on the Equality Act 2010 as a lawful ground to restrict the free speech of students.

(b) Amending the Code on Meetings and Events as follows:

(i) clarifying that the University's policy of ensuring that 'all members of the University community, its visitors and contractors to treat each other with respect, courtesy and consideration' is 'subject at all times to the University's duty to take reasonably practicable steps to secure freedom of speech within the law';

(ii) stating that 'by law the University may not prohibit or sanction speech solely on the ground that it is offensive';

(iii) stating in summary the enhanced legal protections for academic freedom and political speech;

(iv) stating in summary the legal protections for extramural speech by academic staff members; and

(v) stating in summary the law's protection of value judgements and the limitation of employees' duty of loyalty in relation to academic freedom and freedom of speech.

(c) Amending the Harassment Policy to state explicitly that malicious or vexatious allegations are considered a serious offence, and to specify the level of sanction warranted by the making of such allegations.

(d) Amending the Harassment Procedure to include an initial stage, prior to the investigation stage, at which the relevant authority may, having consulted the accused person and the accuser, dismiss a complaint if he or she reasonably believes it to be malicious, frivolous or vexatious.

(e) Ensuring that all staff and decision-makers engaged in disciplinary processes are properly trained in legal standards of academic freedom and freedom of speech.

(f) In the Using Social Media guidance (the "Guidance"), restating, or referring and linking to, the statements set out at paragraph (b) above and removing the wording regarding 'respect, professionalism, courtesy and consideration' and 'highly controversial opinions.'

(g) Amending the Guidance to provide that:

(i) all social media content that is within the Article 10 protection for extramural speech shall fall outside the Guidance;

(ii) the social media content of any student or academic who adopts the recommended disclaimer shall fall outside the Guidance, unless he or she rebuts the disclaimer by taking positive steps to portray his or her opinion as the official opinion or position of the University; and

(iii) any student or (subject to subparagraph (i) above) any academic who chooses not to adopt the disclaimer shall otherwise be fully responsible under the Guidance and other University policies.

(h) Adopting best practice measures that acknowledge the limited scope on social media for conveying academic and political ideas in a formal way (for instance with citations), and the importance of platforms' terms of service.

(i) Deleting the requirement that academic staff members seek the University's prior approval for public campaigning, or amending the policy

to state the limited circumstances in which the University believes it would be lawful to impose such requirement.

The below note, which forms part of this question, sets out in detail the illegality of the policies.

*Signatories:*

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**The following reply to the question above has been approved by Council:**

'Given the importance of ensuring academic freedom, legal advice has been sought from leading counsel as to the concerns raised by the signatories to the letter and, in particular, as to the lawfulness of the University's policies (including its Policy and Procedure on Harassment and its Social Media guidance).

It is correct that the University must take such steps as are reasonably practicable to ensure freedom of speech within the law, and that the University must take into account Article 10 of the European Convention on Human Rights (the "Convention"). The University's commitment to freedom of speech is clear. Its statement on Freedom of Speech, a link to which can be accessed from every page of the University's website, describes it as the lifeblood of a university, stating that "It allows students, teachers and researchers to become better acquainted with the variety of beliefs, theories and opinions in the world."

In formulating its statutes, policies and procedures, the University must also take into account other factors, such as its duties to staff and students, other obligations under the Convention, its public sector equality duties, and the risk of vicarious liability for the acts of its staff. Those factors are reflected, for example, in the University's Policy and Procedure on Harassment, which

states that "The University does not tolerate any form of harassment or victimisation and expects all members of the University community, its visitors and contractors to treat each other with respect, courtesy and consideration".

The University's policies reflect its at times conflicting obligations by requiring standards of behaviour of its members, distinguishing between the freedom to explore and express ideas and the manner in which such ideas are expressed, reflecting the issues to be balanced in the University's approach to concerns that are raised, and making clear the University's commitment to freedom of speech.

In requiring standards of behaviour, the University protects freedom of speech, as reflected in the Code of Practice on Meetings and events: "The University believes that a culture of free, open and robust discussion can be achieved only if all concerned engage critically but courteously with each other."

In summary, the University is both allowed and obliged to take action in response to concerns about the treatment of a member of the University community by a fellow member of the same community and the University is confident that its Policy and Procedure on Harassment and its Social Media guidance reflect and comply with its legal obligations.'

**This note was appended to the question:**

**Note on the Harassment Policy and social media guidance of the University of Oxford**

For the reasons set out below, the University's Harassment Policy and Social Media Policy interfere unlawfully with freedom of speech.

**A. The University's policies**

**The Harassment Policy**

1. Statute XI.2(1)(m) provides:

No member of the University shall in a university context intentionally or recklessly ... engage in the harassment of or sexual misconduct towards any member, visitor, employee, or agent of the University or of any college.

2. Members of the University include academic staff and student members. Harassment is defined at paragraph 1(1)(e) of the Statute as:

unwanted and unwarranted conduct towards another individual which has the purpose or effect of:

- (i) violating that other's dignity; or
- (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for that other.

3. The University's Harassment Policy also prohibits harassment by academic staff and students on similar terms.<sup>1</sup> It is owned by the Personnel Committee (in respect of staff) and Education Committee (in respect of students), and was approved by the University Council. Both committees are constituted under Council Regulations 15 of 2002: Regulations for Committees Reporting Directly to Council or one of its Main Committees, parts 4 and 2 respectively.

4. The Policy further specifies and limits the scope of harassment:

[7] Freedom of speech and academic freedom are protected by law though these rights must be exercised within the law. Vigorous academic debate will not amount to harassment when it is conducted respectfully and without violating the dignity of others or creating an intimidating, hostile, degrading, humiliating or offensive environment for them....

[11] The intentions of the alleged harasser are not always determinative of whether harassment has taken place. The perception of the complainant and the extent to which that perception is in all the circumstances reasonable will also be relevant.

5. The Policy also states that 'harassment may involve repeated forms of unwanted and unwarranted behaviour, but a one-off incident can also amount to harassment.'

**Harassment in law - the Equality Act 2010**

6. Harassment is a statutory tort under the Equality Act 2010. The wording of the Harassment Policy is taken (almost verbatim - see below) from the definition of harassment at section 26 of that Act, and footnote 1 to the Policy

<sup>1</sup> <https://edu.admin.ox.ac.uk/university-policy-on-harassment#widgit-id-1138046>

identifies that Act as the provenance of the definition adopted. Unlike many universities the University, to its credit, explicitly acknowledges at section 11 of the Policy that, in law, any finding of harassment must take into account whether it is reasonable for an alleged victim to perceive that they are being harassed.

7. The statement at section 7 of the Policy that ‘vigorous academic debate will not amount to harassment’ creditably takes account of relevant guidance on the relationship between the Equality Act and academic freedom, and reflects the approach a court would be likely to take. The explanatory notes to the Act, which are legally relevant, clearly emphasise the need to balance academic freedom and academic free speech against the harassment provisions:

[99] In determining the effect of the unwanted conduct, courts and tribunals will continue to be required to balance competing rights on the facts of a particular case. For example, this could include balancing the rights of freedom of expression (as set out in Article 10 of the European Convention on Human Rights) and of academic freedom against the right not to be offended in deciding whether a person has been harassed.

8. The 2019 guidance issued by the Equality and Human Rights Commission, *Freedom of expression: a guide for higher education providers and students’ unions in England and Wales*, further affirms the importance of this balancing exercise and advises that the Equality Act’s harassment provisions cannot be used to undermine academic freedom and are unlikely to apply to academic or political communication (pages 18-19).

9. In other respects, however, both Statute XI and the Policy depart from the legal definition of harassment.

10. As Footnote 1 openly states, the Policy exceeds the requirements of the Equality Act, as does Statute XI. Whereas under that Act conduct only constitutes harassment if it is ‘related to a relevant protected characteristic’ (i.e. age, disability, gender reassignment, marriage and civil partnership, pregnancy and

maternity, race, religion or belief, sex, and sexual orientation), Statute XI and the Policy do away with this requirement. Both provisions therefore purport to exceed the Equality Act, and authorise suppression of speech which is not unlawful under that Act.

11. Both provisions also depart from the Equality Act in applying the prohibition on harassment to students. The Equality Act does not apply universally, but only in the specified contexts and between the specified parties set out in the Act. Sections 91 and 92 of the Act prohibit the University’s governing body from harassing students. Under sections 109 and 110 the University can be liable for harassment of students by its employees, as can the employees themselves. As an employer, the University can further be liable for harassing its employees. Nothing in the Act, however, imposes liability on *students*, nor is the University liable for the conduct of its students as third parties (apart from in specific and limited circumstances). As such, *in relation to the Equality Act*, it follows that the Policy prohibits speech and conduct that are lawful.

#### Harassment in law - The Protection from Harassment Act 1997

12. The University may also seek a legal basis for the Policy under the Protection from Harassment Act 1997, which makes harassment a tort and a criminal offence. That Act and the associated case law define harassment as a course of conduct which targets another person, is oppressive and unacceptable, and which the person knows or ought to know amounts to harassment.

13. The Policy, however, purports to prohibit harassment even when it is a ‘one-off’ incident. This would not amount to a ‘course of conduct’ and therefore, in relation to the 1997 Act, cannot constitute unlawful speech. To that extent, therefore, the Harassment Policy authorises suppression of speech which is lawful under the 1997 Act.

#### **The Social Media Policy**

14. The University’s guidance on ‘Using social media’ (the ‘Social Media Policy’) states:

The University expects all its staff members to treat each other with respect, professionalism, courtesy and consideration in all forms of communication with one another.

Be aware that the creation, transmission, or display of material, which is intended or likely to harass another person, constitutes a breach of the University Policy and Procedure on Harassment. This could lead to both disciplinary action by the University and action by external bodies, depending on the severity of the offence.

At all times be aware that potential conflicts may arise through the use of social media channels, for example publicly expressing highly controversial opinions online. This is especially important with anything that could be interpreted as discriminatory under the terms of the Equality Act 2010, in relation to disability, gender, sexual orientation, race, etc.<sup>2</sup>

15. The Social Media Policy also states that members of staff should ‘obtain written permission from the University before commencing online public campaigns.’

#### **B. The University’s breach of the section 43 duty**

##### **The section 43 duty**

16. Under section 43(1) of the Education (No. 2) Act 1986, the University has a statutory duty to take reasonably practicable steps to secure freedom of speech within the law for students and academic staff of the University. Section 43(1) extends beyond arrangements for speaking events and ‘seeks the securing of freedom of speech in all respects’ (Sedley J in *R (ex p. Riniker) v UCL* [1995] ELR 213, 216).

17. The University is also obliged by the same Act to issue, and to take reasonably practicable steps to comply with, a code of practice setting out how it will fulfil its statutory duty. The University’s Code on Meetings and Events, as approved by Council on 20 July 2016, is the University’s code

<sup>2</sup><https://hr.admin.ox.ac.uk/using-social-media>

of practice under the 1986 Act.<sup>3</sup> For ease of reference, it is termed in this note the ‘Code of Practice’.

18. The Code of Practice states:

[2] The University of Oxford seeks to protect robustly civic and academic freedoms and to foster an academic culture of openness and inclusivity, in which members of our community engage with each other, and the public, in debate and discussion, and remain open to both intellectual challenge and change....

[5] This Code of Practice must be followed by all members, students and employees of the University and visiting speakers....

[7] Freedom of speech and academic freedom must be protected.

19. Parliament enacted the Education (No 2) Act 1986 with the clear intention of compelling universities to protect freedom of speech *within the law* - not freedom of speech *as universities see fit*, nor freedom of speech *in accordance with the good taste of the right-minded*. It follows that the University is not at liberty to impose restrictions on freedom of speech even more restrictive than Parliament intended. Put simply, under section 43 and as a matter of fundamental legality, the University may not dispense with or amend the law as it sees fit. It must take reasonably practicable steps to secure freedom of speech *as it is defined by the law*. A failure to secure freedom of speech as defined in law may be lawful, but only where securing it would have been impractically onerous - for instance due to limitations on resources.

20. It is suggested that Parliament’s intended meaning when it required the securing of ‘freedom of speech within the law’ in 1986 accords with the dicta of Hoffmann LJ (as he was then) in *R v Central Independent Television plc* [1994] 3 All ER 641 at 651 (emphasis added):

The motives which impel judges to assume a power to balance freedom of speech against other

interests are almost always understandable and humane on the facts of the particular case before them.... [A] freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which ‘right-thinking people’ regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute.... It cannot be too strongly emphasised that outside the established exceptions (or any new ones which Parliament may enact in accordance with its obligations under the convention) there is no question of balancing freedom of speech against other interests. It is a trump card which always wins.

#### Particulars of breach of the section 43 duty

##### The Harassment Policy

21. The University is in breach of its duty under section 43(1) of the Education (No 2) Act 1986 to take reasonably practicable steps to secure freedom of speech with the law because, as set out at paragraphs 10 to 13 above, Statute XI.2(1)(m) and the Harassment Policy (the “harassment policies”) prohibit speech by academics and students that is lawful, and thereby authorise an unlawful act.

22. Further, the University has no other lawful basis to prohibit the speech governed by the harassment policies, and it would be a reasonably practicable step for the University to secure such speech.

23. In enacting section 43 of the 1986 Act, Parliament intended to go beyond Article 10 protections by imposing a *positive* duty to secure all speech that is free ‘within the law’ - i.e. that is not expressly prohibited by statute or common law. While Article 10 of the European Convention on Human Rights allows interferences which are ‘prescribed by law’ - ‘law’ in that context including contractual obligations and disciplinary codes - Parliament in section 43 expressly

preferred a higher standard of rights protection. The statutes, policies and contractual terms of the University do not create ‘law’ in the sense intended by section 43.

24. It is accepted that the University’s terms and conditions of employment oblige academic-related staff to comply with the University’s policies. It could therefore be argued that academic staff waive the rights that arise from section 43. However it is fanciful to suppose that Parliament intended to impose a duty which, by way of contracting out, could be simply set aside by those bound by it. If that were possible, section 43 would be a dead letter. In the words of Lord Steyn: ‘Parliament does not intend the plain meaning of its legislation to be evaded. And it is the duty of the courts not to facilitate the circumvention of the parliamentary intent’ (*R v J* [2004] UKFIL 42 at [37]).

25. It is suggested that a court would assess any ‘contracting out’ argument by applying the principles set out in *Johnson v Moreton* [1978] 3 All ER 37. A court will not enforce a contractual term that purports to waive a protection granted in the interest both of a contracting party and the public (pages 48h and 56h). The *Hansard* record shows that Parliament clearly intended to protect the public interest, as well as the private interests of individual academics, in enhancing free speech protections at UK universities.

26. Any contracting out provision is similarly unlikely to be enforceable because of academics’ weaker bargaining power in agreeing terms of employment (*Johnson* pages 49d and 55d), and because of the courts’ unwillingness to accept any construction that would oust the jurisdiction of the Administrative Court to review whether a university is complying with its section 43 duties.

27. It is accepted nevertheless that section 43 imposes a weaker obligation than the ‘clearly mandatory’ statutory wording analysed by the House of Lords in *Johnson*, and that universities need only take ‘such steps as are reasonably practicable’. It is suggested therefore that a contractual term prohibiting mere gratuitous abuse or insult would not frustrate the policy of section 43

<sup>3</sup> <https://compliance.admin.ox.ac.uk/prevent/code-of-practice-on-meetings-and-events#collapse3199386>

and would be enforceable – however any term inhibiting legitimate exercise of academic freedom, or political comment, would not be.

#### The Social Media Policy

28. The Social Media Policy, including when it is implemented in conjunction with the harassment policies, is unlawful under section 43 by virtue of the fact it imposes, and authorises imposition of, blanket restrictions on certain forms of free speech within the law when securing such speech would be reasonably practicable.

29. Speech is not without the law by virtue of the fact it lacks respect, professionalism, courtesy and consideration. The requirement that academic staff so conduct themselves is reasonable but legally baseless – speech that lacks respect, professionalism etc. is still free speech within the law.

30. The University must secure such speech, even if it would rather not, unless the steps required to do so would be unreasonably impracticable – that is not the case. It is easily practicable for the University to refrain from policing the online speech of academic staff.

31. The University can protect academics' extramural speech in practice, while safeguarding its legitimate interests by adopting best practice as set out below.

32. The University should adopt or develop an existing model in devising a pragmatic policy that acknowledges when content is 'academic' in nature despite the constraints of social media. For instance the Academic Expertise and Public Debate policy of the School of Oriental and African Studies provides:

In public debate, such as opinion pieces or columns in the media, it is generally not possible to provide a detailed scholarly justification of the position adopted, nor to present every possible perspective on an issue; but it is expected that the position adopted should be defensible and that justification for it should be either available or able to be given at a level which would be of

acceptable standard in the field of scholarship.<sup>4</sup>

33. The Social Media Policy should further take account of the 'house rules' of individual social media platforms. In any disciplinary proceedings concerning social media content, the decision-maker should presume that, if the content is found not to breach the terms of service of the relevant hosting platform, then in turn it cannot breach University policy. This presumption would be rebutted if the impugned content caused a breach of University policy that the platform could not have been aware of or have competently adjudicated (for instance, breach of confidence or intellectual property rights).

34. As a matter of principle, the policy of the University – as an institution founded on tolerance, free thought and free expression – should in all circumstances be more liberal and open-minded than the policy of social media platforms. For that reason, the converse of the above should not apply – content that is removed from a social media platform should not be presumed to breach University policy. It is suggested that the advent of the Online Safety Bill, which will compel platforms to proactively moderate illegal and harmful content, will make the proposed amendment inevitable – it will be implausible to hold that social media content allowed under the new online regime *shouldn't* be allowed under the University's liberal regime.

#### Compliance with Code of Practice

35. The harassment policies are unlawful because they breach the University's obligation to take reasonably practicable steps to secure compliance with the requirements under the Code of Practice that the University will 'protect robustly civic and academic freedoms and to foster an academic culture of openness and inclusivity' and protect freedom of speech and academic freedom.

36. To the extent that the Code of Practice purports to limit lawful freedom of speech in order to secure that 'all members of the University community, its visitors and contractors to treat each other with respect, courtesy and consideration',

the Code of Practice is in breach of section 43(3) of the 1986 Act which requires the University to issue the Code 'with a view to facilitating the discharge of the duty' at section 43(1).

#### **C. The University's breach of the Human Rights Act 1998**

37. The University is a public authority for the purposes of the Human Rights Act 1998, and under section 6 of that Act may not act incompatibly with the rights set out in the European Convention on Human Rights.

38. Article 10 of the Convention states:

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

#### **Scope of Article 10(1)**

##### The freedom to offend

39. It is well established in the common law and the case law of the European Court of Human Rights that the right to freedom of speech extends far beyond the limits envisaged by the Harassment Policy. As the Strasbourg Court said in *Handyside v United Kingdom* (1979-80) 1 EHRR 737, the freedom protected by Article 10 'is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.' The freedom to offend is also recognised in common law. Lord Justice Sedley held in *Redmond-Bate v Director of Public Prosecutions* (1999) 7 BHRC 375 at para 20 that: 'Free speech includes not

<sup>4</sup> <https://www.soas.ac.uk/admin/governance/policies/file125452.pdf>

only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative ... Freedom only to speak inoffensively is not worth having.’

#### Academic freedom protections

40. The European Court accords a particularly high level of protection to academic freedom, and has held that academics, like members of the press, merit the highest level of protection as ‘public watchdogs’ (*Magyar Helsinki Bizottság v. Hungary*, App. no. 18030/11 (2016), [167] and [168]).

41. In *Kula v Turkey*, App. No. 20233/06 (2018) [38] and [39], the Court held that even a *minimal* sanction or reprimand can constitute an unlawful interference with an academic’s exercise of academic freedom.

42. Further, in the case of *Sorguç v. Turkey*, App. no. 17089/03 (2009) [34] and [35], the Court held that academic freedom comprises freedom to distribute knowledge and truth *without restriction*, and that attacks on reputation of person or institution must be assessed in light of the special importance of academic freedom.

43. The above was reaffirmed in *Erdoğan v. Turkey*, Apps. nos. 346/04 and 39779/04 (2014), a case which concerned a group of academics’ scathing attack against members of Turkey’s constitutional court, in which the academics asserted that they lacked intellectual and professional capability, were incapable of open-mindedness, and acted out of ‘prejudice’. The Court explicitly stated (concurring opinion, [10]) that ‘ordinary’ protections of reputation and private life do not apply in the context of academic discussion of matters of public concern, whether that discussion be within or without the academic context. The academic’s ‘strategic role in guaranteeing an informed public and in building a society based on democracy’ therefore limits *even further* the scope to interfere with academic speech on the ground it is offensive or intemperate.

#### Extramural speech

44. The judgment in *Erdoğan* at paragraph [40] also established that academic freedom protections apply beyond the teaching and research

settings and extend ‘to the academics’ freedom to express freely their views and opinions, even if controversial or unpopular, in the areas of their research, professional expertise and competence.’ At paragraph [3] of the concurring opinion, the Court also stated that Article 10 guarantees freedom of ‘extramural’ speech ‘which embraces not only academics’ mutual exchange (in various forms) of opinions on matters of academic interest, but also their addresses to the general public.’

#### Political speech protections

45. Political expression merits the highest degree of protection under the common law and under Article 10 of the European Convention on Human Rights. The lawful scope for limiting such expression is highly restricted. In the words of Lord Nicholls in *R v BBC, ex p ProLife Alliance* [2003] UKHL 23:

Freedom of political speech is a freedom of the very highest importance in any country which lays claim to being a democracy. Restrictions on this freedom need to be examined rigorously by all concerned, not least the courts.

This position was echoed by the European Court of Human Rights in *Vajnai v Hungary*, App. no. 33629/06 (2008).

46. Therefore, any interference by the University with the political speech of its employees or students will require exceptional justification if it is to be lawful.

47. In *Kharlamov v. Russia*, App no. 27447/07 (2016) concurring opinion [5], the European Court held that the range of political speech protected by the Convention extends to the internal politics of universities and ‘inherently protects democratic principles through the freedom of expression applicable to any organisation.’

48. Employees’ and students’ comments regarding political events and political figures within the local political world of the University (such as election to various student unions and bodies within the University and political activities, campaigns, opinions etc by students and staff), as well as expressions that fall within the broad definition of politics as ‘matters of public concern’ (*Wingrove v United Kingdom*, App no.17419/90 (1996)

[58]), are to receive a very high degree of protection in the University’s policies.

#### **Lawful interference**

49. Under Article 10(2) of the Convention, the University may interfere with free expression where interference is ‘prescribed by law’, ‘necessary in a democratic society’ (that is to say, corresponding to a pressing social need), and a proportionate means of achieving a legitimate aim prescribed by Article 10(2). As set out above, there is little scope for interference in relation to speech that is academic or political in nature (or both), and any interference must be carefully scrutinised by a court of law.

#### Prescribed by law: contractual obligations

50. While the University is a public authority subject to human rights and public law duties, its contractual relationship with its employees is a matter of private law. The law recognises that employees owe a duty of loyalty. An employee’s contractual promise to comply with his or her employer’s policies and instructions (such as the Harassment Policy) are ‘prescribed by law’ and can in certain circumstances override that employee’s right to freedom of expression.

51. The University’s power to rely on such contractual promises is, however, constricted by the principle in *Herbai v Hungary* App. no. 11608/15 (5 February 2020), in which the European Court set out the following criteria to be applied by courts in determining when an employee’s duty of loyalty can override his or her right to freedom of expression:

a) *Nature of the speech* - academic and political/public interest speech is highly protected. Aspects that would weigh against Article 10 protection would include the comments being racist or otherwise hateful, or constituting an exceptionally gratuitous attack on another person.

b) *Motives of the author* - comments made in good faith would be more likely to be protected. Comments made from personal grievance or antagonism, or for pecuniary gain, would be less likely to be protected.

c) *Damage caused to the employer* – for instance breach of confidential information (but note that ‘disrepute’ carries little weight – see below).

d) *Severity of sanction* – a more severe sanction is less likely to be a proportionate interference with the right to freedom of expression.

52. The University cannot therefore rely automatically on the contractual obligation of academic staff to comply with University policy. Determining whether the duty of loyalty outweighs the right to freedom of expression calls unavoidably for judgment and sensitivity to the facts of the case. In light of the very high level of protection for speech of an academic or political nature, we suggest that in most cases the balance will tip in favour of freedom of expression, unless the academic in question has engaged in extreme conduct.

#### Reputation or rights of others

53. The legitimate aim of the Harassment Policy, within the limits of Article 10(2), is to protect the right of others not to be harassed or abused and to protect their reputation from baseless attack. However, important limitations constrict pursuit of this aim.

54. First, the University’s right to suppress speech causing ‘disrepute’ to itself is restricted by the judgment in *Kharlamov v. Russia*, App no. 27447/07 (ECtHR 8 January 2016), paragraph 29 where the Court held that protection of a university’s reputation is a ‘mere institutional interest’ and ‘not necessarily of the same strength as “the protection of the reputation or rights of others” within the meaning of Article 10§2.’

55. In parallel, though not under the Convention, UK employment law restrains employers from dismissing employees in response to a ‘kneejerk’ impression that an employee’s conduct has caused disrepute. The employer must demonstrate either that the employee’s conduct actually caused disrepute, or that disrepute was reasonably likely as a result of the employee’s conduct.

56. As previously mentioned, the Convention further protects academics’ right to criticise the institution in which they work (see *Sorguç* [35], *Kharlamov* [27]). The *UNESCO Recommendation concerning*

*the Status of Higher-Education Teaching Personnel*, 11 November 1997, to which the Statutes give effect, affirms the same right. Such criticism must therefore be excluded from conduct prohibited on the grounds of ‘disrepute’.

57. Second, a value statement or value judgement with a ‘sufficient’ basis in fact cannot be deemed ‘harassment’ under Statute XI or the Harassment Policy. Indeed Strasbourg jurisprudence is clear that academic freedom in particular includes a wide freedom to express value judgments, even when expressed in ‘strong and harsh remarks’ (*Erdoğan*, concurring opinion [9]) so long as it can be proven, for instance because it was ‘based on personal experience ... and information which was already known in academic circles’ (*Sorguç* [32]).

58. Within the context of political debate, the European Court has held that the terms ‘closet Nazi’ (*Scharsach and News Verlagsgesellschaft v Austria*, App. no. 39394/98 (2004)) and ‘neofascist’ (*Karman v Russia*, App. no. 29372/02 (2009)) constitute protected value judgments.

#### **Particulars of breach of the Human Rights Act 1998**

59. The harassment policies and/or the Social Media Policy are unlawful under section 6 of the Human Rights Act 1998 because, for the reasons set out below, they are incompatible with Article 10 of the Convention and therefore authorise unlawful interference with freedom of expression.

#### Unlawful interference with freedom of expression and academic freedom

60. The harassment policies interfere with, or authorise interference with, speech that is protected by Article 10.

61. Speech that has the purpose or effect of violating another’s dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for another is (whatever its moral wrongness) protected under Article 10 absent some reason why its prohibition either pursues a legitimate aim under Article 10(2), or is unlawful under Article 17 of the Convention. The harassment policies establish no such grounds. They apply irrespective of whether the impugned speech relates to a protected characteristic (or otherwise constitutes unlawful conduct)

and without regard to the special protections for academic freedom and political speech, or to the limitations on employees’ duty of loyalty. It is to be reasonably inferred that the harassment policies are intended to apply despite these legal limitations.

62. Furthermore, by failing to have in place a preliminary stage at which meritless complaints (including vexatious, malicious and/or frivolous complaints) can be dismissed, the Harassment Policy allows and authorises disproportionate interference with the right to freedom of expression. Pursuit of the legitimate aim of protecting the rights and reputations of others does not require a blanket commitment to pursue all complaints regardless of their merits. Initiating harassment proceedings on the basis of clearly meritless complaints will impose a disproportionate burden on students and academics who have exercised their lawful rights, and will in practice incentivise baseless complaints in the knowledge that the targeted academic or student will in effect be punished simply by virtue of being dragged through the process.

#### Unlawful interference with extramural speech

63. The Social Media Policy, including when it is implemented in conjunction with the harassment policies, is unlawful under section 6 of the Human Rights Act 1998 because, for the reasons set out at paragraphs 25 and 26 above, it interferes, and authorises interference with, speech that is protected under Article 10.

64. It is accepted that the University has a legitimate interest in requiring its employees to conduct themselves in a respectful, professional, courteous and considerate way, and that an obligation to do so as part of employees’ duty of loyalty can be consistent with Article 10 protections.

65. Under the *Herbai v Hungary* criteria, however, the University’s scope to compel such conduct narrows when the speech in question is academic or political in nature. The Social Media Policy makes no such allowance – in fact, in warning employees about ‘highly controversial’ speech, the Policy applies more onerously when it should by law be more permissive.

66. By warning academic staff against ‘expressing highly controversial opinions’ in public, the Social Media Policy imposes at least a ‘minimal’ interference with academics’ protected extramural speech. Contrary to the Social Media Policy, free speech protections should apply *with particular force* in relation to highly controversial opinions, as expression of such opinions is likely to constitute political speech.

67. The requirement that academic staff seek the University’s written permission before commencing any public campaign is an unlawful interference with academics’ rights to freedom of expression under Article 10 and association under Article 11. The University may not dictate what kinds of campaigns (online or otherwise) its staff might wish to run, support or subscribe to. The Strasbourg Court held in *Kula v Turkey* (cited above at [39]) that academic freedom includes an academic’s untrammelled freedom to disseminate information *without the authorisation of his or her supervisors*.

68. While it is foreseeable that the University could have a legitimate interest in seeking prior approval for certain forms of campaigning - for instance, a campaign that might be mistaken for a campaign by the University - a blanket requirement is disproportionate and unlawful.

#### **D. Next steps**

69. The law leaves the University very little scope to interfere with the free speech of its academic staff and students. The University’s policies, however, purport to dispense with its legal obligations and authorise unlawful conduct. They are therefore unlawful. Implementation of the policies as they stand is likely further to result in unlawful decisions.

70. The University’s failure to implement policies that defend academics’ legal right to freedom of speech and academic freedom encourages and helps those who call for harassment of, and violence against, dissenting academics. That failure puts the University at risk of legal action and liability in damages, a risk which will only increase when the Higher Education (Freedom of Speech) Bill becomes law. In addition, failure to secure academic freedom

and freedom of speech poses a grave risk to the University’s reputation.

71. In relation to a more general culture of free speech compliance, it is suggested that the University should adopt the liberal position taken by the University of Cambridge in its recent Statement on Freedom of Speech, and replace demands in the policies for ‘respect’ with a demand for ‘tolerance’<sup>5</sup>. The Oxford Statement on Freedom of Speech correctly states that ‘not all theories deserve equal respect.’

72. For all of the reasons set out in this note, the University should make the changes to the Harassment Policy and the Social Media Policy that are set out in the question to which this note is attached.

<sup>5</sup>[www.governanceandcompliance.admin.cam.ac.uk/governance-and-strategy/university-statement-freedom-speech](http://www.governanceandcompliance.admin.cam.ac.uk/governance-and-strategy/university-statement-freedom-speech)